

³ The Board notes that, following the May 6, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of disability, commencing July 30, 2018, causally related to her accepted June 15, 2017 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 15, 2017 appellant, then a 34-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date she twisted her left ankle as she stepped out of her mail truck while in the performance of duty. On July 5, 2017 OWCP accepted sprain of the calcaneofibular ligament of the left ankle.⁵ On January 5, 2018 it expanded the acceptance of appellant's claim to include strain and laceration of muscles and tendons of peroneal muscle group of the lower left leg and laceration of muscle and tendon of the peroneal muscle group at the lower left leg. Appellant worked intermittent modified-duty work until January 11, 2018 when Dr. John J. Stapleton, a podiatrist, performed authorized repair of a left peroneal brevis split tear and fibular groove deepening. OWCP paid her wage-loss compensation on the supplemental rolls from January 20 through April 13, 2018. Appellant returned to full-time, modified-duty work on April 17, 2018.⁶

A July 24, 2018 magnetic resonance imaging (MRI) scan of the left ankle revealed postsurgical changes, no other tendon or ligament injury, and a stable osteochondral injury along the posterior dome of the talus.

In a July 25, 2018 progress note, Dr. Stapleton noted that appellant had twisted her left ankle on June 12, 2018 and subsequently had persistent left ankle pain that was increasing in intensity. Left ankle examination demonstrated tenderness over the peroneal tendon, laxity of the peroneal tendon with hypermobility, instability to the contralateral ankle, and mild edema. Dr. Stapleton diagnosed acute left ankle pain, osteochondral defect, and tendinosis. In an unsigned correspondence of even date, he noted that appellant was under his care and advised that she should not work due to medical illness.

In a July 30, 2018 report, Dr. Daniel Fuchs, an orthopedic surgeon, noted the history of appellant's June 15, 2017 work injury. He described her medical and surgical history, and noted

⁴ Docket No. 19-1456 (issued July 14, 2020).

⁵ On November 24, 2017 appellant filed a Form CA-1 alleging that on that date she twisted her left ankle as she stepped off the sidewalk while in the performance of duty. OWCP assigned OWCP File No. xxxxxx563. By decision dated January 8, 2018, it denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the injury and/or events occurred as she described. OWCP explained that she had not submitted factual evidence to support that she experienced a work-related injury on November 24, 2017.

⁶ Appellant signed an offer of modified limited-duty assignment on April 17, 2018. The duties of the position were one to two hours each casing mail, administrative duties, and working undeliverable mail with two hours delivering/carrying mail. Appellant was restricted to two hours each, standing, walking, and delivering.

her complaint of persistent pain and swelling in the area of the peroneal tendons status post tendon repair, and that she had a mild aggravation the previous month when she rolled her left ankle. Dr. Fuchs indicated that a July 2018 MRI scan demonstrated a small posterolateral osteochondral lesion of the talar dome. Findings on left ankle examination included intact sensation to light touch, a well-healed surgical incision of the peroneal tendons, mild swelling, and tenderness to palpation. Dr. Fuchs diagnosed left lower extremity peroneal tendinitis and recommended immobilization in a controlled ankle movement (CAM) boot and physical therapy. He advised that appellant was disabled from work. On a form report of same date Dr. Fuchs diagnosed left peroneal tendon tear, recommended a CAM boot, weight bearing as tolerated, and advised that appellant could return to modified sedentary work.

On July 31, 2018 appellant filed a notice of recurrence (Form CA-2a). She indicated that the recurrence began on July 18, 2018 due to left ankle pain and weakness, and that it was causally related to her accepted June 15, 2017 employment injury. Appellant stopped work on July 30, 2018.

By decision dated October 19, 2018, OWCP denied appellant's claim, finding that she had not sustained a recurrence of disability commencing July 30, 2018 causally related to her June 15, 2017 employment injury.

On October 31, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

In procedure notes dated November 5, 2018 and January 7, 2019, Dr. Stapleton treated appellant in follow up. He opined that her current condition was clearly related to the initial work injury, noting that, after she had repair of her peroneal brevis tendon, her symptoms continued and were secondary to tendinosis and scarring from this repair and that she required revision surgery. On March 4, 2019 Dr. Stapleton noted that appellant was doing well, but had a complaint of mild, intermittent pain over the medial aspect of her left ankle, worsened with extended activity, and that ankle range of motion was still limited due to pain. He diagnosed status post-surgery and a low-grade osteochondral defect. Dr. Stapleton reiterated his opinion that appellant's current condition was due to the June 15, 2017 employment injury.

In an April 10, 2019 report, Dr. Mitchell E. Cooper, a Board-certified orthopedic surgeon, noted appellant's complaint of a two-year history of left ankle pain with current complaints of lateral midfoot pain, aggravated by direct pressure and weight bearing. He noted the September 27, 2018 surgery and that appellant reported that she had twisted her ankle the previous week and had increased pain since that time. Dr. Cooper reviewed the July 24, 2018 left ankle MRI scan and advised that he was not sure that appellant was symptomatic from osteochondritis dissecans.

By decision dated May 29, 2019, OWCP's hearing representative affirmed the October 19, 2018 decision.

On June 25, 2019 appellant, through counsel, appealed to the Board. By decision dated July 14, 2020, the Board set aside the May 29, 2019 decision and remanded the case for further medical development. The Board found Dr. Stapleton's opinion sufficient to require further

development of the medical evidence. The Board further instructed OWCP to administratively combine OWCP File No. xxxxxx157 and File No. xxxxxx563.⁷

OWCP received additional evidence. On May 24, 2019 Dr. Cooper treated appellant in follow up for left ankle pain, which she attributed to an injury in June 2017. He noted that she was status post peroneal brevis to longus transfer with tenodesis performed on September 27, 2018. Dr. Cooper diagnosed persistent left ankle pain, deep ankle pain slightly lateral, and small osteochondritis dissecans (OCD) post lateral talus. He continued appellant's work restrictions.

On March 2, 2021 OWCP referred appellant, the case record and a SOAF for a second opinion examination to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon. It requested that Dr. Didizian evaluate appellant's current disability status in connection with the June 15, 2017 date of injury and need for treatment medically connected to this injury.⁸

In a March 18, 2021 report, Dr. Didizian discussed appellant's factual and medical history and reported physical examination findings. Examination of both ankles revealed no synovitis, effusion, or crepitation, full range of motion of both ankles, intact peripheral pulses, no atrophic changes, intact sensation in both ankles, reflexes present and equal, and negative pivot test of the left ankle. Dr. Didizian diagnosed sprain of the calcaneofibular ligament, left ankle, strain of muscles and tendons of the peroneal muscle group at lower left leg, laceration of the muscles and tendons of the peroneal muscle group, and osteochondritis dissecans. He noted that the June 15, 2017 employment injury did not cause or aggravate an additional left ankle condition causing surgery on September 27, 2018 and did not cause recurrent employment-related disability. Dr. Didizian noted that appellant currently worked as a postmaster with no difficulty and opined that she would not be able to go back to her original job because of multiple surgeries and ongoing symptomology. He indicated that appellant continued to have residuals of her work-related injury and was not fully recovered. In a work capacity evaluation (Form OWCP-5c), Dr. Didizian noted appellant could perform light-duty work with restrictions on standing, walking, pushing, pulling, and lifting.

By decision dated May 6, 2021, OWCP expanded the acceptance of appellant's claim to include osteochondritis dissecans of the left ankle.

By a second decision dated May 6, 2021, OWCP denied appellant's recurrence claim, finding that she did not sustain a recurrence of disability commencing July 30, 2018 causally related to her June 15, 2017 employment injury. It found that the weight of the medical evidence rested with Dr. Didizian, the OWCP referral physician.

LEGAL PRECEDENT

OWCP's implementing regulations define a recurrence of disability as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition,

⁷ OWCP administratively combined OWCP File No. xxxxxx157 and OWCP File No. xxxxxx563, with the former serving as the master file, in accordance with the Board's decision dated July 14, 2020.

⁸ OWCP received additional evidence. Appellant attended physical therapy treatment on January 14 through 23, 2020. Also submitted was a September 9, 2020 pathology report for a thigh biopsy.

which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment.⁹

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.¹⁰ Where no such rationale is present, the medical evidence is of diminished probative value.¹¹

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.¹²

ANALYSIS

The Board finds that this case is not in posture for decision.

Initially, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's May 29, 2019 decision, which was considered by the Board in its July 14, 2020 decision. Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.¹³

In a March 18, 2021 report, second opinion physician, Dr. Didizian, conducted an examination of both ankles and reported no abnormalities. He diagnosed sprain of the calcaneofibular ligament, left ankle, strain of muscles and tendons of the peroneal muscle group at lower left leg, laceration of the muscles and tendons of the peroneal muscle group, and osteochondritis dissecans. Dr. Didizian noted that the June 15, 2017 employment injury did not cause or aggravate an additional left ankle condition resulting in surgery on September 27, 2018, and did not cause recurrent employment-related disability. He noted that appellant currently worked as a postmaster with no difficulty and opined that she would not be able to go back to her original job because of multiple surgeries and ongoing symptomology. Dr. Didizian opined that appellant continued to have residuals of her work-related injury and was not fully recovered. In a Form

⁹ 20 C.F.R. § 10.5(x).

¹⁰ See *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

¹¹ *Id.*

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *D.T.*, Docket No. 19-1064 (issued February 20, 2020).

¹³ *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

OWCP-5c, he noted that appellant could perform light-duty work with restrictions on standing, walking, pushing, pulling, and lifting.

Dr. Didizian, however, provided only conclusory responses to the questions posed by OWCP with regard to whether appellant sustained a recurrence of disability on July 30, 2018 due to a material change or worsening of her June 15, 2017 employment injury; whether she sustained an aggravation of her accepted injury; and/or whether the September 27, 2018 left ankle surgery was related to her work injury.¹⁴ The Board has held that a report is conclusory and of limited probative value regarding causal relationship if it does not contain medical rationale.¹⁵ As Dr. Didizian did not provide a rationalized medical opinion explaining how the claimed recurrence was causally related to the accepted June 15, 2017 employment injury, his report was insufficient to establish causal relationship.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹⁶ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁷ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹⁸

On remand OWCP shall provide an updated SOAF request a supplemental report from Dr. Didizian thoroughly addressing the issues and providing medical rationale in support of his opinion. Following any necessary further development, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁴ See *D.M.*, Docket No. 19-1181 (issued December 2, 2019). See also *P.R.*, Docket No. 19-1313 (issued August 11, 2020); see also *S.S.*, Docket No. 18-0397 (issued January 15, 2019).

¹⁵ See *R.W.*, Docket No. 19-1733 (issued April 13, 2021); *D.W.*, Docket No. 18-1139 (issued May 21, 2019); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

¹⁶ *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

¹⁷ *Id.*; see also *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁸ *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 2, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board